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In The
Supreme Court of the United States
October Term, 1987

CITY OF YONKERS AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

YONKERS BRANCH, NAACP, ET AL.,

Respondent.

RESPONDENT YONKERS BRANCH NAACP, ET AL'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY CITY OF YONKERS AND YONKERS COMMUNITY DEVELOPMENT AGENCY

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OPINIONS BELOW

On January 28, 1988, the district court entered a Consent Decree signed by the City of Yonkers (hereinafter the "City"); the United States and the Yonkers Branch, NAACP, et al. (hereinater "NAACP") which is attached hereto in full.

STATEMENT

1. In December 1980, the United States of America filed suit alleging, *inter alia*, that Yonkers has intentionally confined assisted housing to minority identified

neighborhoods in southwest Yonkers and refused, in part for racially motivated reasons, to allow the placement of such housing in three quarters of the City, those quadrants overwhelmingly populated by white persons.

2. In July 1981, the district court granted the motion of the Yonkers Branch, NAACP, et al., to intervene in these proceedings and, in 1982, their motion for class certification on behalf, as relevant here, of minority (black and Hispanic) residents of Yonkers eligible to reside in assisted housing.[1]

3. The matter proceeded through extensive discovery and pre-trial motion practice and came on for trial in August 1983. Trial lasted some 92 days with more than 80 witnesses and thousands of exhibits.

4. At trial, numerous former and current City officials admitted that racial discrimination played a substantial, indeed overwhelming, role in site selection decisions.[2] For instance, Morton Yulish, former Director of Yonkers' Department of Development, a predecessor

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1. As used in this litigation, assisted housing comprehends housing built pursuant to the Public Housing Act of 1937, as well as other federal and state subsidy programs, including section 236; section 8 new and substantial rehabilitation and Mitchell-Lama.

2. Among these officials were; Alfred Del Bello, then Lieutenant Governor of New York and formerly Mayor and councilman in Yonkers; Andrew O'Rourke, currently County Executive, Westchester County, and formerly City Councilman, Yonkers; Dominick Iannocone, former Vice Mayor and Majority Leader; Angelo Martinelli, long-time Mayor of Yonkers; Morton Yulish, former Director, Department of Development; Walter Webdale, former Director, Department of Development and Urban Renewal Agency; Herman Keith, former employee of Yonkers CDA; Philip Pistone, Director of Planning Department since 1957; Nicholas Longo, City Council Member; John Hanney; former City Council member; Michael Cipriani, City Council member and, through depositions, many other members of the City Council.

of the Community Development Agency (hereinafter "CDA"), testified that in his many discussions with east side City Council members, they repeatedly vetoed the location of assisted housing in their wards because of the vehement, racially-based opposition of their constituents. 62a-63a; 80a-88a.* Herman Keith, a former employee of CDA and a past President of the NAACP Branch, testified that through the 1970's, several City Managers acknowledged to him the desirability of providing more scattered sites for assisted housing, but indicated that in light of the fervent racially-based opposition to any such construction, it was simply impossible.

Political leaders told the district court much the same story.[3] One, Dominick Iannocone, former Vice Mayor and majority leader of the City Council, testified that he had conversed with each east side council member concerning the placement of assisted housing in their wards and that each told the same story: their constituents harbored fears of prospective minority residents whom they associated with assisted housing. They opposed residential integration on this ground, making its provision politically impossible.[4] In addition, according to Iannocone's

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*References are to Appendices submitted by Yonkers Board of Education accompanying its Petition for Writ of Certiorari.

3. The district court's detailed review of the relevant evidence may be found at 21a-162a.

4. Ianoconne testified that he, too, had blocked the placement of a public housing project in an overwhelmingly white section of his ward after local residents raised fears of racial incursion with him. Instead of publicly expressing the true basis for his action—a desire to cater to the wishes of these constituents knowing full well their racially discriminatory motivation—Iannocone testified that he used parliamentary procedures to "bury" the site in question and to block its consideration. In addition, he simply made up pretexts to use in opposing the site, knowing all the while that his opposition was the direct consequence of the racially motivated community opposition to the site (74a-76a).

unrefuted trial testimony, council members intended, by maintaining these white neighborhoods free of assisted housing, to insure the continued segregation of area public schools. 73a-77a.

Despite the intensity of this racially-based opposition to publicly-assisted housing, the Yonkers Municipal Housing Authority and other agencies proposed to the City Council numerous sites for assisted housing in east and Northwest Yonkers. Indeed, the district court carefully traced the submission and consideration of these sites over a more than thirty year period, finding that perfectly appropriate sites were repeatedly rejected for racially discriminatory reasons and that neutral factors both favored the use of many of these sites and disfavored the municipal practice of concentrating assisted housing in a roughly one square mile area of minority concentration in and around Getty Square, the City's oldest section.[5]

5. The district court concluded that the City's policy of placing assisted housing - some 38 projects with 6600 units - in one quadrant of the City was both racially motivated and had stark racial impact. Members of the City Council vetoed other locations for racial reasons and found it more politically practical to overwhelm those

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5. On this last issue, the district court found that the city's own planners voiced strong disagreement with the concentration of assisted housing in southwest Yonkers, predicting (correctly) that such a concentration would confirm the racial identifiability of such areas—for minorities—and accelerate white flight (107a-117a). At the same time, the repeated racially-motivated rejections of appropriate sites elsewhere in Yonkers had a reciprocal effect: reinforcing, by official imprimatuer, the all white nature of those neighborhoods and signalling minorities and whites that government supported the discriminatory private housing practices which the record also reflects in graphic and shocking detail.

voices in the minority community who opposed the concentration of assisted housing. The city intended, through this practice, not merely to segregate housing patterns, but to insure continuing public school segregation. And, the segregative impact was clear: both direct and indirect. On the one hand, the white neighborhoods retained their overwhelmingly homogenous racial character; on the other, the minority areas became more densely populated and increasingly black and Hispanic.

6. The district court also considered the interrelationship between the allegedly independent Yonkers Board of Education (hereinafter "YBE") and the City of Yonkers. Noting the financial dependency of the YBE and the Mayor's unfettered power of appointment of YBE members, the district court found that, with his own election as Mayor in November 1973, Angelo Martinelli began a concerted effort to affect the policies of the YBE. 44a-458a. To this end, he intentionally replaced members who favored implementing integrative policies with persons he knew to be staunchly opposed to any alteration of the status quo. 444a-458a. The Mayor declined to reappoint outstanding school board members because they favored one or another plan to better utilize school facilities, a consequence of which might have been school integration. The Mayor also specifically opposed desegregative policies and intruded into the affairs of the YBE. In short, the district court concluded, "Here there is a pattern of appointments, reappointments, and failures to appoint over time, with the consistent result of impending the efforts of the school district to address the racial balance of the schools. In addition, the appointment of Board members must be viewed not in isolation but in conjunction with other contemporaneous occurrences in the city. The increasing efforts to establish a Board firmly committed to neighborhood schools dovetailed neatly with

the City's most concentrated development of family-populated subsidized housing projects in southwest Yonkers. . . .and the subsequent resistance to the development of subsidized housing in East Yonkers. . . ." 457a. When combined with the intentionally segregative impact of municipal housing policies, the Mayor's use of his appointment power caused the district court to hold the City liable for school segregation as well as housing segregation.

7. The City appealed the district court's opinion of November 20, 1985 to the Court of Appeals for the Second Circuit. In its appeal, the City specifically declined to challenge any of the district court's findings of fact as clearly erroneous and, instead, asserted that, as it had no obligation to construct assisted housing, the fact that it did so in an intentionally segregative manner did not make out either a statutory or constitutional violation. The Court of Appeals squarely rejected this argument and found fully supported both the district court's findings of fact and its legal conclusions.[6]

8. With respect to the City's responsibility for school segregation, on appeal, Yonkers did not challenge the district court's fact-finding as clearly erroneous, conceding that the record fully supported its determination as to the intent and effect of the Mayor's. Instead, in the Second Circuit, the City submitted that the district court

6. The Second Circuit held that a municipality which builds assisted housing may not "proceed with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in residential patterns. *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). Yonkers does not contest this conclusion directly in its petition.

overstepped its role by inquiring into the Mayor's motives in making YBE appointments. The Court of Appeals affirmed the findings of fact made by the district court, 644a-648a, and agreed that the Mayor had used his appointive authority "as a means of furthering the city's segregative objectives." 656a. It also found this evidence of segregative intent admissible, distinguishing this suit from one seeking to enjoin specific mayoral appointments, *Cf., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974).* In short, the Second Circuit could find "nothing [which] forbids judicial recognition of the pattern in which municipal discretion is exercised in order to fathom the municipality's underlying intent. The ineluctable conclusion that Martinelli's appointments were made with segregative intent supports the district court's conclusion that the segregated state of the Yonkers public schools - resulting from the City's confinement of minority housing to already minority neighborhoods and from the Board's adherence to a neighborhood school policy, its discriminatory faculty assignment and special program policies and its failure to take any steps to achieve school desegregation - was not simply coincidental." 704a.

9. In short, the Court of Appeals concluded that Yonkers had intended, through its housing policies, to insure the perpetuation of public school segregation and that Mayor Martinelli had further insured this outcome through his selections to the YBE.

10. In light of the egregious violations of constitutional rights committed by Yonkers, the district court entered a comprehensive housing remedy order on May

28, 1986.[7] The Court of Appeals upheld the propriety of each aspect of that order, including those which specifically required the City to fund the school desegregation plan.

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7. In accepting further Community Development Block Grants (hereinafter "CDBG") from HUD in July 1980, Yonkers agreed to the administrative condition that it build 100 units of assisted housing in East Yonkers when funding became available. In 1981 and 1982, HUD conditioned Yonkers' receipt of CDBG monies on the City's express promise to build 200 units of assisted housing. Again, in those years, no federal monies for this purpose were made available.

In February 1984, the Yonkers Branch, NAACP signed a Consent Decree with added-defendant, the Department of Housing and Urban Development which, *inter alia*, reserved funds sufficient for the construction of 200 units of public housing in East Yonkers. Under the terms of this Decree, approved by the district court in March 1984 after a fairness hearing, HUD notified Yonkers of the availability of these federal funds and required the City to submit appropriate sites. The City failed to timely submit sites. Finally, when faced with further administrative sanctions, the City submitted two sites which HUD eventually rejected as entirely inappropriate and inconsistent with the integrative intent of the CDBG conditions.

By May 1986, the date of the housing remedy order, Yonkers had failed to submit any appropriate East Side sites to HUD for public housing. The district court's remedy order incorporated this requirement, giving Yonkers ninety days to comply. The City refused to submit any sites, violating the district court's remedy order. Before doing so, Yonkers unsuccessfully sought a stay of this aspect of the remedy order in the district court; the Court of Appeals and in this Court.

Yonkers' refusal to comply with the housing remedy order continued through 1987. In January 1988, the City finally agreed to locate the 200 units of public housing on seven specific sites in East Yonkers. This agreement is the subject of the January 28, 1988 Consent Decree. Attachment A hereto. In this Decree, Yonkers expressly waived its right to seek further appellate review of any issue relating to the placement of these 200 units of public housing, whether of its underlying liability which predicated this remedy or the quantum and means of implementing this remedy. *See*, Section 10. Thereafter, citing vociferous community opposition to the terms of the Consent Decree, Yonkers moved the district court to vacate this waiver provision. Sec-

11. In the same opinion which found the City liable for housing and school segregation, the district court found the YBE liable under the 14th Amendment for the segregation of minority school children, as well as the denial of equal educational opportunity to those children. To remedy these violations, the court directed the defendants to submit plans. The City submited no proposal. The YBE offered its so-called Educational Improvement Plan (hereinafter "EIP"). The City filed no comments concerning the EIP and, during remedial hearings held in April 1986, its counsel raised no objection to the plan, other than the City's general contention that it should not be required to fund *any* desegregation plan. The district court rejected that argument and ordered the City to fund the necessary operating and capital expenses associated with the desegregation program. That program included the following central features: closing of four elementary schools; three junior high schools and one high school; re-

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tion 10 of the Decree. The district court denied that motion and the City has not appealed that denial to the Court of Appeals. Accordingly, here the City is bound by the Consent Decree not to raise any issue relating to its obligation to construct 200 units of public housing in East Yonkers or the agreed-upon means of implementing that consensual resolution.

With respect to other aspects of the remedy order, the City has likewise failed entirely to develop (as it was required to do by November 15, 1986) a long term housing remedy. By order of February 1987, upon plaintiffs' motion for relief from the City's contemptuous failure to implement the remedy order, the district court approved the appointment of an Outside Housing Advisor to perform the tasks required under the remedy order of the City. To date, the district court has not ordered implementation of a final long term housing remedy plan. In January 1988, the City agreed to the principal components of such an order, but then refused to finalize any Decree on this issue. Currently, pending before the district court is Plaintiffs' joint motion for entry of a long term housing remedy order.

drawing of boundary lines for junior and senior high schools so as to create integrated attendance zones; introduction of specialized magnet programs in six identifiably minority elementary schools; encouragement of minority students to transfer from these six elementary schools to overwhelmingly white schools in East and northwest Yonkers through active recruitment, curricular innovation and provision of free transportation; active encouragement of white students to choose one of the six minority area elementary magnet schools, and construction of two new schools, one to replace a long deteriorated minority area elementary school, # 19, and the other to house magnet programs for junior high school students in a manner to be coordinated with the Hudson River Museum, a major cultural institution on the City's west side. The district court entered specific findings that the plan, with its diverse features, was necessary to desegregate the Yonkers public schools and required the City to provide additional operating funds necessary to its implementation, as well as capital resources needed to refurbish and modernize certain aging facilities and to construct the two new schools.

12. While the district court's orders of May 28, 1986 and July 1, 1986 clearly require city funding of these elements, the district court effectively stayed the construction of the two new schools until the City could present further argumentation as to their necessity and cost. In February 1988, after referring this matter to a court-appointed Monitor who held proceedings on city objections to the new schools, the district court adopted the Monitor's recommendation, again ordering that both schools be built as originally contemplated in the May 13, 1986 school desegregation order. The City is currently appealing the propriety of the order that it fund the construction of these two new schools in the Court of Appeals for

the Second Circuit.[8]

13. In its appeal of liability and remedy orders to the Court of appeals, the City challenged the district court's requirement that it fund a more expensive voluntary desegregation plan, as opposed to a fully mandatory plan, which would have relied exclusively on busing, and not on creating programs designed to attract pupils to opposite race schools. Rejecting this argument, the Court of Appeals noted that the City did not support a more mandatory plan in the district court and that such a plan was "not a remedy the City at all prefers". 712A. Moreover, the Court of Appeals found that "[I]n selecting the desegregation plan ordered here, the district court plainly made appropriate efforts to eliminate any expense that was not necessary to remedy the violations found and to minimize the degree to which the remedy would interfere with the autonomy of the City and the Board." 712A-713A. Finally, the Court of Appeals found that, while more expensive than a fully mandatory plan, the voluntary plan "is both less intrusive and more likely to achieve long-term success in desegregating the public schools". *Id.*, and rejected Yonkers' suggestion that, by requiring its funding, the district court had abused its discretion.[9]

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8. The City's reply brief in that matter is due on May 23, with oral argument slated in the Court of Appeals on June 3, 1988. The issue before the Court of Appeals is whether, in requiring the two new schools, the district court properly found that they were desegregation related and necessary to the efficacious implementation of the school desegregation plan.

9. The City's Petition (at 9) inaccurately summarizes the Court of Appeals' reasoning on this matter, relating that that Court simply relied upon the City's responsibility for funding the YBE as a basis for the order that it fund an admittedly more expensive plan. To the contrary, the Court of Appeals held that (a) the City itself had never sup-

REASONS FOR DENYING THE PETITION

In support of its petition, the City raises three arguments, none of which merits review by this court on this record. First, Yonkers questions whether a city can be held liable for school segregation where the Board of Education has committed independent segregative acts. Second, Yonkers asserts that, absent findings of their necessity, it may not be ordered to pay for (unspecified) elements of a more expensive voluntary desegregation plan, as opposed to a less expensive one. Third, Yonkers denies that it may properly be held liable for a violation of the Fourteenth Amendment based on governmental acquiescence to racially-based community opposition to the placement of assisted housing in white neighborhoods.

Contrary to Yonkers shrill assertions, the district court and the Court of Appeals for the Second Circuit properly decided each of these issues and the City cannot point to any conflict among the circuits with regard to any legal principle relied upon here.

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ported a cheaper, more mandatory plan below; (b) on the evidence before him, the district court properly concluded that a voluntary plan, particularly at the elementary school grades, had a better chance to yield long-term remedy of the constitutional violations than did a more mandatory approach and (c) that, contrary to the City's suggestion, the district court had insured minimal intrusion into local affairs, focusing merely on insuring the City's allocation of those funds necessary for desegregation and declining to otherwise become embroiled in the annual conflicts between City and YBE over operating budgets (712a-713a).

I. THE CITY'S LIABILITY FOR SCHOOL SEGREGATION WAS PROPERLY FOUNDED UPON THE EFFECT OF ITS OWN UNCONSTITUTIONAL CONDUCT

The district court found that City officials intended, through segregative housing practices, to insure the perpetuation of public school segregation in Yonkers. (500a) Moreover, the district court found, as a matter of fact, that through its exclusive placement of assisted housing for families in southwest Yonkers, the City had intentionally exacerbated and perpetuated school segregation. Finally, the longtime Mayor replaced school board trustees committed to rectifying unequal educational opportunity and segregation with persons committed to insuring preservation of the racial status quo. Yonkers challenged none of these findings of fact in the Court of Appeals and is not now challenging any of them.

Instead, Yonkers submits that no decision of this court has ever held a municipality liable for a violation of the Fourteenth Amendment on these grounds. To the contrary, this court has long since recognized that housing-related practices which intentionally foster school segregation may predicate liability for the unconstitutional condition. *Milliken v. Bradley,* 418 U.S. 717 (1974). Moreover, in *United States v. Board of School Commissioners of Indianapolis,* 573 F.2d 400 (7th Cir., *cert. denied,* 439 U.S. 824 (1978), suburban school systems were held liable under the Fourteenth Amendment in part because their communities resisted the efforts of the Housing Authority of the City of Indianapolis to place assisted housing in their midst and so contributed to the confinement of blacks in the central city school district and, reciprocally, to the overwhelmingly white nature of those suburbs.

In addition, the City's suggestion that the district court and Court of Appeals abdicated their proper role by failing to "first determine whether there was any action in the conduct of the business of the [City] which [was] intended to, and did in fact, discriminate against minority pupils, teachers or staff." *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977) is baseless. Both courts below found that the City's actions in the housing sphere were motivated, in part, by a desire to maintain segregated schools, an obvious act of discrimination against minority pupils.[10] And, through his exercise of the appointment authority, the Mayor clearly affected the policies and practices of the YBE, his principal goal as he remade that Board in his own image. Again, the courts below squarely held, as a matter of fact, that to remake educational policy in a segregative manner was a primary objective of Martinelli's and one which the Mayor accomplished.

In short, applying the principles articulated by the City itself, the courts below found that the City's practice of segregating assisted housing on the basis of race clearly

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10. Nor is either decision below based on "foreseeability" analysis. The district court, crediting the testimony of former Vice Mayor Dominick Iannacone, found that City officials intended to maintain school segregation and that this motivation informed their pursuit of municipal housing policies. The City's distortion of the impact of the Court of Appeals' decision (at 13) misrepresents the foundation of that Court's ruling which fully embraced prior decisions of this court requiring a finding of intent for a Fourteenth Amendment violation. *See,* 701a where Court of Appeals recites that "Nearly all of the Councilmen from East Yonkers stated explicitly that their constituents opposed minority housing in their neighborhoods in part because they sought to keep minority children out of their schools" as one piece of support for its conclusion that the City "deliberately sought to preserve segregation in the schools, both for the sake of the schools and for the sake of the neighborhoods." (702a).

and intentionally contributed to the offensive condition: segregation of minority pupils by dint of state action. That the School Board also acted with discriminatory intent no more undercuts these findings than did, for instance, the Sixth Circuit's affirmance of state liability in *Reed v. Rhodes,* 662 f.2d 1219 (6th Cir.1981) *Cert. denied* 455 U.S. 1018 (1982), in any way require modification of its prior ruling that the Cleveland School Board had intentionally segregated pupils on the basis of race.

II. THE PARADE OF HORRIBLES ENVISIONED BY THE CITY IS FAR-FETCHED AND OFFERS NO BASIS FOR REVIEW OF THIS MATTER.

The City suggests that the sound opinions below "lead to virtually limitless liability for any city which is found to contribute to segregated housing patterns." (Brief at 14). In fact, the conditions found in Yonkers were and are extreme - of the thirty eight housing projects built since the 1940's, all were located in areas of minority concentration but one (a senior citizen project in East Yonkers). Repeatedly, as the evidence marshalled below makes clear, proposals to utilize sites outside areas of minority concentration were made and rejected for no neutral, non-racial reason. The district court properly concluded that insuring segregated schools was a principal objective of the white community, which, acting through its council members, successfully resisted assisted housing in white neighborhoods. In short, in such extreme situations a finding of liability of elected municipal officials for school segregation is fully warranted. It cannot reasonably be submitted that liability here is improper because other, closer cases might demand different outcomes. The issue is not what a district court might do where the effect of the municipal housing policies are "minor," for here the courts below concluded, and Yonkers does not challenge

the finding is clearly erroneous, that the effects of segregative housing practices profoundly influenced and insured school segregation.

III. THE DECISIONS BELOW DO NOT INVADE THE MAYOR'S APPOINTMENT AUTHORITY

In assessing the presence of segregative and discriminatory municipal motivation, the district court analyzed Mayor Angelo Martinelli's appointments to the School Board between 1974 and 1980. The district court found that the Mayor used as a litmus test a potential candidate's opposition to "busing" and that he rid the YBE of all members committed to dealing with the twin problems of educational inequality and segregation. The City suggests that this inquiry strikes at the heart of local control of educational functions and the process of local control over schools. Petition at 14-15.

This contention is without foundation, and indeed, rather ironic. The City loudly relies upon the so-called independence of the YBE, but never challenges as clearly erroneous the district court's conclusion that the Mayor deeply politicized the YBE and, in fact, exercised control over its policies through his appointments.

Here plaintiffs did not seek to enjoin appointments to the YBE or any other city board. They engaged, instead, in a careful analysis of the Mayor's exercise of discretion to determine what could reasonably be concluded as to his and the City's intent. What came clear and what the City never challenges is that, despite the alleged independence of the YBE, as a policy-making body under state law, Mayor Martinelli himself determined the direction of the Board on critical matters of educational and social policy and insured that persons he appointed shared his outlook

and commitment to oppose integrative measures. This process coincided with other segregative municipal actions: i.e., rejection of the section 8 existing housing program and placement of all assisted housing in southwest Yonkers.

Having analyzed the circumstances and nature of these appointments, the district court found that they had evidentiary value, confirming the City's discriminatory and segregative design. The Court of Appeals agreed.[11]

The City submits that relying upon evidence as to the nature of the Mayor's discharge of a discretionary act is improper. Instead, it suggests that evidence that state actors have violated the Constitution by their own conduct is required. But, this argument is circular. The courts found that the Mayor had the authority to control appointments and did so with a specific discriminatory and segregative intent. The City fails to challenge this factual finding, which, of course, relates to the Mayor's *own conduct*.[12] Liability here does not attach because of the foreseeable conduct of appointees; rather, it stems from the inten-

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11. Again, the City's suggestion (Petition at 15) that foreseeability analysis underlies the intent findings in this area is fallacious. The courts below found that the Mayor formed a clearly segregative intent in making these appointments and that predictably those he appointed, after application of his litmus test, acted as expected.

12. The City's arguments as to control over the School Board is misplaced. First, as it fully controlled the YBE's operating and capital budget, the City obviously had considerable leverage over the full panoply of YBE affairs. But, second, the courts below found that, having re-oriented the YBE through his appointments, the Mayor had no need to exercise more day to day control. Instead, as we demonstrated in our Brief opposing the YBE's petition to this court for review, the Martinelli appointees did his bidding on the YBE with little direct interference from him.

tionality with which the Mayor acted. *Cf. City Petition* at 16.[13]

Equally groundless is the City's contention that here the district court held it liable when another entity had legal responsibility for the underlying unconstitutional conditions. Petition at 17. The City cites to *Milliken v. Bradley, supra.*, for this proposition, but there, this Court determined that suburban school districts, never afforded due process, could not be included in a school desegregation remedy as a means of providing an integrated education for minority students from Detroit. Here, the City was a full party to all proceedings and as the Court of Appeals affirmed, "When two actors have cooperated in a given venture, each contributing to the outcome that each desires, it requires no stretch of legal doctrine to conclude that each actor is liable if the result deliberately attained is unlawful." 702a. And, here, the "City sought unabashedly to have the Board do its bidding by preserving neighborhood schools in part in order to preserve the segregated residential patterns" which it had created. 704a.[14]

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13. This makes irrelevant the City's suggestion that under *United States v. Pate*, 324 F.Supp. 935, 939, *aff'd.*, 400 U.S. 806 (1970) public officials are presumed to act in good faith and lawfully. The issue is not how the Mayor assumed certain persons would act, but how he intended them to act in light of his intimate knowledge of them and the rationale for their appointment.

14. The City suggests that the opinion below contradicts the principle that a federal court may only remedy discriminatory conduct in the administration of a state law or program against those officials empowered to administer that law or program." Petition at 17. Again, it is the City's formulation that is inconsistent with precedent. In many school desegregation cases, states have both been found liable for school district segregation and ordered to fund remedies despite their lack of direct control over school district programs.

IV. THE CITY'S ATTACK ON THE FUNDING ORDERS IS DISINGENUOUS AND DOES NOT RAISE ANY UNSETTLED ISSUE OF CONSTITUTIONAL LAW

Having found Yonkers liable with the YBE for massive school segregation, the district court required local defendants to formulate, in the first instance, an appropriate remedy. In response, the YBE submitted a plan calculated to desegregate elementary schools in a voluntary manner. The City neither resisted the specifics of this proposal nor offered any alternative.

The district court properly found that a systemwide school desegregation remedy was appropriate.[15] The plan implemented through the May 13, 1986 Order is appropriately systemwide in effect and promises to work. In approving it, the Court of Appeals specifically noted that the district court properly preferred this approach to one which simply re-assigned students in part because this plan had a greater probability of long-term success.

Yonkers now submits that a mandatory reassignment remedy would have been less expensive and, in an incredible distortion of events, suggests that "the Board eagerly incurs additional expenses - including the construction of new schools - which it passes on to the City." Petition at

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15. The YBE does not raise any challenge to the scope of the court-ordered remedy in its Petition, but, rather contests the bases of its liability, as found below.

19.[16] In fact, the requirement for two new schools was an "integral" part of the *initial* remedy order, not an additional or new expense. Through it, the district court insured the replacement of a dilapidated school, #19 which, in later proceedings, the City's own expert, Dr. Robert Dentler, stated was inadequate on every standard used for judging school facilities. Moreover, the YBE had proposed razing and replacing this minority-area facility as early as 1967. In addition, as part of the original school desegregation order and both to redress the imbalance in burden placed on minority students through the closing of three southwest Yonkers junior high schools (Longfellow, Fermi and Hawthorne) and that quadrant's only high school (Yonkers High School), and to provide a suitable location for the junior high school gifted and talented program and a junior high school magnet program in the sciences, the district court approved the YBE's proposal to construct the Hudson River Museum School.[17]

In neither 1986-87 nor 1987-88 did the City raise issue concerning any allegedly excessive funds requested by the YBE to implement school desegregation programs. No such dispute is before this court. Instead, the City requests this Court, in the absence of a live dispute, "to determine

16. In fact, since the start of the plan, the YBE, with the support of the plaintiffs, has made several changes calculated to save the City millions of dollars, most notably retaining the Saunders Trade and Technical High School at its former location and not moving it to the site of the old Yonkers High School, while reciprocally re-locating Burroughs Junior High School to the latter site.

17. The City is currently appealing the propriety of the district court's 1987 and 1988 orders requiring, when taken together, funding of the two new schools. It cannot be heard here on that issue as well.

under what circumstances a federal court may order expenditures beyond the constitutionally required minimum in cases involving non-busing desegregation remedies." Petition at 20. But, as there is no live issue for resolution, either as between the YBE and the City or between the City and the district court, this Court should decline any such abstract invitation. The fact is the City does not object here to any specific aspect of the funding order and, without some specific and concrete objection, deliberated and ruled upon by courts below, this court should not issue an advisory opinion.

1. While we agree that courts should exercise their equitable authority to remedy constitutional violations, it is patent that gross constitutional violations here occurred and the voluntary remedy is precisely tailored to its elimination. None of this court's prior cases counsel for the expenditure of the "constitutional minimum"; rather, the remedy for unconstitutional segregation must "promise to work", *Green v. County School Board,* 391 U.S. 430 (1968) and, as the Court of Appeals here found, the plan ordered by the district court has that virtue. 713a.

2. Moreover, the City has made no showing here that any aspect of that plan, as adopted in May 1986, was unnecessary to the whole or required to insure the fair sharing of desegregation-related burdens.

3. The City proposes that it, rather than the federal courts, should judge what level of appropriation beyond the constitutional minimum is appropriate. But this unprecedented suggestion defies any logic. Here, as the Court of Appeals noted, the City failed to object to any specific aspect of the YBE's plan. Nor did it advocate a mandatory plan below. The YBE presented a comprehensive proposal with many inter-linked components. The Ci-

ty would have this Court find that it has the constitutional authority, as a joint tort-feasor, to pick and choose what aspects of this plan should be implemented. Rarely has such a baseless argument been advanced, particularly where the City never told the district court of any element of the YBE's proposal to which it objected or why.

In justifying its position, the City suggests that "by making expenditures beyond the constitutionally-required minimum, local authorities have demonstrated their good faith willingness to comply with constitutional obligations." Nonsense. Here, Yonkers was ordered to fund a desegregation remedy to cure unconstitutional conditions it helped cause. It deserves absolutely no credit for its begruding compliance with a lawful court order, one, parenthetically that the City sought a stay of with no success.

The YBE here has had no windfall; it has expended monies to cure unequal educational opportunities and segregation, as directed by the district court.

In this light, the City's rhetorical arguments should be dismissed and its invitation for judicial review rejected. Moreover, the district court has been careful not to intrude in the general budget-making process between the YBE and the City.

4. There is no conflict whatsoever between *Liddell v. State of Missouri,* 731 F.2d 1294 (8th Cir. 1984) and the Second Circuit's opinion in Yonkers. In *Liddell, supra.,* the Eighth Circuit found that the district court had failed to find certain aspects of the desegregation plan necessary to eliminate the constitutional violation. In *Yonkers,* the Court of Appeals affirmed the district court's conclusion

that the comprehensive desegregation plan included only expenditures necessary for that enterprise.[18]

V. THE INTERNALIZATON OF RACIAL DISCRIMINATION AS ONE AMONG MANY LEGITIMATE POLITICAL INTERESTS IS CONTRARY TO SETTLED LAW AND IS DANGEROUS

This Court has long since determined that state actors may not capitulate to the racial hatred of the mob in making governmental decisions. *Lucas v. Colorado General Assembly, 377 U.S.* 713, 736-37 (1964). No matter how badly the majority may want goverment to practice or promote racial intolerance and segregation, no state actor may succumb to such pressures while respecting the Fourteenth Amendment. *Palmore v. Sidoti, 466 U.S. 429, 433 (1984).* Without this bedrock principle, government could simply respond affirmatively to the discriminatory sentiments of constituents and act to disadvantage, stigmatize and segregate members of minority groups, later arguing that such actions were compelled by the will of the community. A more pernicious doctrine; one more at cross purposes with our constitutional system can hardly be articulated.

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18. In the district court, the parties were asked to specify any areas of disagreement with the YBE's EIP. The district court then held remedy hearings on disputed matters and approved the rest of the board-proposed plan as if it were stipulated to. The City did not make specific objections based on lack of necessity or cost to any particular magnet program or to any renovation deemed needed by school authorities so as to house that program design. In this context, any argument by petitioner that the district court's findings were inadequate is a direct result of its own failure to raise issue with matters in a timely manner, thus leading all other parties and the district court to believe that the City was stipulating to that aspect of the remedy plan.

Yet, it is this doctrine which Yonkers embraces in a desparate effort to get this Court to review its liability here.[19]

1. In so inviting review, Yonkers does not challenge the underlying facts found by both courts below: that residents of white neighborhoods boisterously and persistently opposed the location of any assisted housing for families in three quarters of the city; that city council members, fully apprised as to the racist nature of that opposition, bowed to it and blocked, buried and vetoed numerous otherwise suitable sites for assisted housing in white neighborhoods, intentionally confining all 38 family projects in southwest Yonkers; that City Councilmembers lead this opposition on occasions, playing to it to further their political careers and that strong non-racial reasons disfavored such a concentration. Admitting all these facts, which are painstakingly elaborated upon by the district court, Yonkers submits that the district court made no explicit finding that City officials acted with discriminatory intent.

The Second Circuit soundly rejected this precise argument, 674a-676a, noting that the district court found that "numerous city officials not only responded to,

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19. As previously noted, by signing the Consent Decree of January 28, 1988, Yonkers waived any right to seek further appellate review, including review by this court, of its underlying liability for the construction of 200 units of public housing. This liability clearly relates to the central findings made below—that Yonkers succumbed to racist community sentiment and so excluded all assisted housing from three quarters of its midst. Yonkers now, without as much as mentioning the January 28, 1988 Consent Degree, or its own waiver of appellate rights, as agreed to therein, seeks this Court's review of its underlying liability. This improper request should be rejected on the basis of the Consent Decree alone, as Yonkers voluntarily entered into it after a vote of its City Council, and is bound by its terms.

but. . . .'led the fight against subsidized housing in East Yonkers.' 624 F.Supp. at 1373." The Court of Appeals further chronicled prominent examples of the discriminatory actions of Yonkers political leaders as they agitated and built political careers on the hysterical opposition to assisted housing. 676a.

2. On p. 24 of its Petition, the City attempts to rewrite the findings of fact entered by the district court. The district court found that racial animus was a "significant" factor in local opposition to assisted housing. The City has never challenged this finding as clearly erroneous and it stands as law of the case. On the other hand, the City's contention that there are other, wholly legitimate bases for opposing low income housing finds *no* record support. Indeed, the district court concludes that the assertions of any such "neutral" reasons were merely pretextual, thinly disguising racial animus. So, while numerous apartment houses were constructed throughout East Yonkers, no subsidized low rise could be placed in any such neighborhood.[20]

3. While the City now states that economics, not race, played the "dominant" role in opposition to assisted

20. The City's depiction of East Yonkers as comprised of "single family residential areas" is itself fanciful as there are hundreds of apartment buildings along such streets as Midland Avenue; Bronx River Road; Tuckahoe Road; Yonkers Avenue and Palmer Road, all in East Yonkers. The fact is that when assisted housing was proposed proximate to these apartment buildings, they were defeated as rudely as when they were proposed more proximate to single family residential areas. Moreover, southwest Yonkers contained single family residential areas, but these served as no ground for denying the proponents of assisted apartment houses permits to construct. In short, the City's analysis here seeks to re-try the case, a clearly erroneous enterprise at this stage of the proceedings. *Cf.* 176a, n. 68.

housing in East Yonkers (Petition at 25), it cites to no such finding by the district court. There is no such finding. The district court squarely found that the significant and persistent basis for opposition to assisted housing was "racial" 24a; 174a-178a.

4. Moreover, the district court found, and Yonkers never challenged as clearly erroneous, that the significant racially-motivated opposition to assisted housing in east Yonkers dominated the political process. 178a. Racial animus was not one among a number of factors. Rather it created a highly polarized atmosphere which members of the City Council understood as a make or break factor in their political careers. 81a-88a. Thus, as the district court explained at length east side council members could not support assisted housing in their wards and be re-elected. There was no political compromise inherent in such decision-making, merely domination by the mob.

5. The district court repeatedly found that Yonkers officials acted with racially discriminatory intent in segregating housing for those in need of assistance. Yonkers ignores these numerous passages in continuing to disingenuously submit that the district court somehow forgot to make this finding. Instead, at 174a, the district court specifically concluded that "whatever differences in personnel or program there may have been throughout the years, subsidized housing in Yonkers has been characterized by a common theme: racially influenced opposition to subsidized housing in certain areas of the City, and acquiescence in that opposition by city officials." Again, at 179a, the district court squarely concluded, and Yonkers fails to challenge as clearly erroneous, that "there can be little doubt that with respect to the selection of sites for subsidized housing, appeasement of racially influenced community opposition was an important factor for a very

"significant percentage of those who were responsible for the city's conduct," *United States v. City of Birmingham, supra.*, 538 F.Supp. at 828."

The city is on no firmer ground in asserting before this Court that "there are significant non-racial justifications for the City official's decisions." Petition at 27.

After analyzing the evidence of any such justification, the district court entered entirely contrary findings of fact: "The City has offered various alternative explanations for the pattern of sites approved by City officials, but the exlanations are plausible only if evaluated in the abstract. When applied to the record, none raises any significant doubt about the effect of community opposition on site selection." (emphasis added) (179a).

Moreover, the district court squarely concluded in applying the criteria set out for inferring discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 264-65 (1977), that "the record reflects repeated disregard of Planning Board objections or recommendations; inconsistent application of stated planning criteria; and, in general, varying degrees of scrutiny depending upon whether the site in question was east or west of the Saw Mill River Parkway." 181a.

In evaluating the conduct of municipal decisionmakers, the court explicitly found that they acceded to community pressure which they knew to be racially motivated, 181a, and led the fight against subsidized housing in East Yonkers in many specific ways and "under circumstances which provide a virtual compendium of the factors that courts have been charged to look for in order to detect the presence of discriminatory intent". *Id.*

And, in the clearest contradiction to the City's current argument that it did not conclude that City officials engaged in invidious discrimination, the district court held: "Having considered the evidence in its entirety, this Court is fully persuaded that the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures to select and support only sites that would preserve existing patterns of segregation." **(emphasis added).**

7. Contrary to the City's argument, in no modern case has the evidence of discriminatory intent been so strong and complete as in Yonkers. In the passages cited above, the district court found that Yonkers officials had intentionally discriminated to create the pattern of housing demonstrated in the record. Indeed, the fact that they discriminated in response to community pressures, while perhaps explanatory of the officials' motives, is legally irrelevant. The governing principle is that officials may not act in an intentionally segregated manner. That the community supports or demands such action does not matter and is no excuse. *Palmore v. Sidoti,* 466 U.S. 429 (1984).

8. In the instant case, the district court examined forty years of governmental decision-making, not the passage of a single referendum, as in *Angell v. Town of Manchester,* 3 EOHC (P-H), #15,398 (D.Conn. 1981). That the district court in *Angell, supra.,* found the evidence of discriminatory intent lacking has no bearing here, where based on overwhelming evidence, the district court reached a contrary conclusion, affirmed in full by the Second Circuit. While the court in *Angell, supra.,* may have found it extremely difficult on the basis of the isolated act under review to ascertain governmental motive, here a review of

thousands of documents; hundreds of incidents and most critically, the testimony of numerous government officials like Alfred del Bello and Dominick Iannocone, who conceded the influence of the racially motivated mob, made this a relatively simple case.

CONCLUSION

The NAACP urges this court to resoundingly and expeditiously deny certiorari, putting an end to the hopes of a hostile, racially motivated mob who continue to resist the guarantee of equal housing rights to racial minorities. With that action, we hope and pray that integration of long barred communities will begin and a process of healing can commence.

Respectfully submitted,

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ATTACHMENT A—FIRST REMEDIAL CONSENT DECREE IN EQUITY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Plaintiff-Intervenor,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

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80 CIV 6761 (LBS)

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public

housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent degree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	*Maximum Density*
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also

*If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities," provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final develop-

*The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

ment plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as pro-

vided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as

contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are

deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 25, 1988

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SO ORDERED:
s/ Leonard B. Sand
Leonard B. Sand, U.S.D.J.
Dated: January 28, 1988